United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 8893

CHARLES E. SCHMIDT ET AL., MINORITY STOCKHOLDERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, Intervening Petitioners, *Appellants,*

vs.

UNITED STATES OF AMERICA, NORTHERN PACIFIC RAILWAY COMPANY, ET AL., *Appellees.*

Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Motion to Dismiss and Brief of Appellees Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, City Bank Farmers Trust Company.

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STATEMENT OF THE CASE.

This suit was filed by the United States on July 31, 1930 (R. 225). It was brought pursuant to the Act of June 25, 1929 (46 Stat. 41), to adjust the land grants made to the Northern Pacific Railroad Company by the Act of July 2, 1864, granting lands to aid in the construction of a railroad from Lake Superior to Puget Sound, and by the Joint Resolution of May 31, 1870, making an additional grant to aid in construction of a railroad from Portland to Puget Sound.

Sections 4 and 5 of the Act of June 25, 1929, are as follows:

> "Sec. 4. The provisions of this Act shall not be construed as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.
>
> "Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be en-

titled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, *and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact, and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies, or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870,* and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment." (Italics supplied)

Section 7 provides that the suit shall be brought in a District Court of the United States within the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, as the Government may elect. Said Section 7 contains the following provision:

> "Any case begun in accordance with this Act *shall be expedited in every way,* and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for."

The bill of complaint is voluminous. All of the questions which the Attorney General thought appropriate to comply with said Act of 1929 are presented. On February 25, 1932 (the order is not printed in the record) this cause was referred to a Special Master to make a report, with findings and conclusions, on certain motions, demurrers and pleas filed by defendants against certain paragraphs of the complaint. The Master filed his report May 31, 1933 (R. 428-662).

The foreclosure and reorganization of 1875, so much discussed in appellants' brief, is presented by paragraphs IX, X, XI and XII of the complaint. The Master's report (R. 495) disposes of this issue, holding, in substance, that said proceedings of 1875 did not divest the Northern Pacific Railroad Company of any of its rights in the land grant, and that said company, the federal corporation, constructed and completed the railroad as required by said Act and Joint Resolution. However, as appellants were not stockholders

in 1875 and as the report is favorable to the Railroad Company, they are benefited, not prejudiced, by this finding.

The 1896 foreclosure is drawn in question by subdivision XVIII of the complaint and is disposed of by the Master's first report (R. 640 et seq.). The Master found that the mortgages issued pursuant to the Joint Resolution of May 31, 1870, were valid, and the foreclosure proceedings of 1896 and the deeds issued pursuant thereto, conveying said railroad and land grant to the Northern Pacific Railway Company, were valid. See also the Master's report on subdivision XIII of the complaint (R. 632-34).

The Master's report was in all things confirmed, the District Court overruling all exceptions. See Judge Webster's memorandum decision (R. 674) and the order of October 3, 1935, confirming the report (R. 680).

This order, of course, was merely interlocutory from which no appeal lay. Afterwards and on April 21, 1936 (R. 684), the court made a further order of reference to the Special Master, directing him to proceed with the hearing of the cause and to take evidence relative to all matters not covered by his prior report of May 31, 1933, except evidence relative to the value of the land and the amount of compensation due as provided by said Act of June 25, 1929, and report his findings and conclusions and recommendations for a decree.

On May 22, 1936, Congress passed a special appeal statute reading as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United

States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect." (ch. 444, 49 Stat. 1369)

By this statute the interlocutory order confirming the Master's first report was made appealable and the decree to be entered on the Master's second report was likewise made appealable. The appeal from both orders is direct to the Supreme Court.

Pursuant to the order of re-reference the Master on July 26, 1937, filed his report on the adjustment of the grants (R. 686-887), covering the extent to which the United States and the railroad company had complied with the terms of the grants, the deficiency in the grants and the acreage for which the Railway Company is entitled to compensation, all as provided by said Act of June 25, 1929. This report did not, of course, determine the value of said lands nor the amount of compensation to which the Railway Company is

entitled as that issue was expressly excluded from the order of re-reference. It will be determined in a further re-reference after the decision of the Supreme Court on the two appealable orders has been handed down. Prior to that time it cannot be known, of course, whether the Master's report and the order of the District Court thereon made a correct determination of the deficiency and of the number of acres to which the Railway Company is entitled to compensation.

Both parties filed exceptions to the Master's second report, defendants on August 9, 1937 (R. 887), and plaintiff on August 13, 1937 (R. 893). By order filed March 22, 1938, the court passed upon most of these exceptions, sustaining some and overruling others (R. 1211-1216). The last paragraph of the order (R. 1215), expressly provides that there are additional matters connected with the Master's report yet to be considered before the review of said report may be completed and the decree entered of which the Supreme Court is given jurisdiction to review by said Act of May 22, 1936, and the court retains jurisdiction of the case for the purpose of determining said matters and to make findings of fact, and conclusions of law, all as provided by said Act of June 25, 1929. The effect of this order is that this cause is still pending before the District Court for the purpose of deciding certain unsettled issues and for settling findings and conclusions and a form of decree preliminary to the direct appeal to the Supreme Court from both orders, that is, the order entered confirming the Master's first report and the order or decree to be entered on the Master's second report.

At this place further explanation is necessary. Until the special appeal statute of May 22, 1936, the order confirming the Master's first report was purely interlocutory. No findings, conclusions or decree or statement of evidence or other steps

were taken, which are ordinarily incident to an appeal. It was not known at that time that an appeal ever could or would be taken from that order. Had that order been appealable at the time it was entered, it would have been supported undoubtedly by appropriate findings, conclusions and a proper decree. This omission it is expected will be supplied by the decree to be entered on the Master's second report after the unsettled matters have been decided and findings, conclusions and decree have been prepared and signed by the court. What we wish now to emphasize is that the matters which must be determined in accordance with Section 5 of the Act of June 25, 1929, have not yet been determined because of certain issues which must be determined before findings, conclusions and final decree can be entered in the District Court. The findings, conclusions and decree which will be entered will fully comply with said Act of June 25, 1929. This is sufficient answer to all of appellants' contentions based upon the claim that the District Court has not complied with the Act of 1929.

After the exceptions to the Master's second report had been filed, as stated, but before the court ruled thereon, these appellants on September 3, 1937, filed what they called, "Answer and Cross Bill of the Northern Pacific Railroad Company by Charles E. Schmidt and Other Minority Stockholders of said Railroad Company", (R. 952-1030). By this document they pretend to answer the complaint for the Northern Pacific Railroad Company, which was made party by the complaint filed in July, 1930, and had in due time appeared in the cause by its duly authorized counsel. Besides the answer, this document asserts a so-called cross-bill by which appellants seek to litigate certain claims as minority stockholders of the old Northern Pacific Railroad Com-

pany, contending that the foreclosure of the mortgages executed by that company and the sale of the railroad and land grant to Northern Pacific Railway Company in 1896 were invalid. The position asserted is that the Railroad Company is the owner of the railroad and the land grant as against the Railway Company, and they seek to adjudicate in this cause the internal disputes of the stockholders of the Northern Pacific Railroad Company and the Northern Pacific Railway Company. Appellants' Brief, p. 4 of Index, points 16, 19 to 22. See also prayer of cross-bill (R. 1024).

On motion of both plaintiff (R. 1030) and defendants (R. 1032) this so-called answer and cross-bill was stricken from the files by order dated March 9, 1938 (R. 1187). The ground of plaintiff's motion was that no leave had been asked or obtained as required by District Court Rule 21, and on the ground that no cause of action was stated against the United States (R. 1030). The grounds of defendants' motion were, among others, that said parties may appear by complaint in intervention only after leave therefor has been asked and given under Equity Rule 37; that said cross-bill had not been filed within the time fixed by Rule 21; that the taking of evidence in this case has been commenced and has been completed and said cross-bill comes too late; that said issues set up by said cross-bill are not germane to nor in any way related to the subject matter of the complaint and cannot be asserted in this cause.

By said order of March 9, 1938, both motions were sustained and the so-called answer and cross-bill stricken. The last paragraph of said order is as follows (R. 1189):

> "It is further ordered, that this order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and

Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves, to assert in any other proceeding any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

After filing of said answer and cross-bill and after plaintiff's and defendants' motions to strike had been filed, but before the motions were passed on, and on January 31, 1938, appellants filed petition for leave to intervene herein (R. 1037-1175). This so-called petition adopted paragraphs 43 to 67 of the cross bill which has been stricken from the files and is no proper part of the record in this cause, although much quoted by appellants in their brief. This petition again sets up claims arising out of appellants' alleged status as stockholders of Northern Pacific Railroad Company. Upon the objections of plaintiff and defendants the petition for leave to intervene was denied by the same order of March 9, 1938 (R. 1188) which also struck out the so-called answer and cross-bill. This order, as above shown, expressly provides that it is without prejudice to the rights of these appellants or any other alleged stockholders to assert in any other proceeding any rights they may have by reason of the allegations of said cross-bill and petition for leave to intervene.

After these orders were made these appellants still persisted in filing various documents and leave so to do was denied and said documents stricken from the files by the order dated March 22, 1938 (R. 1209). The last paragraph of said order of March 22, 1938, again expressly provides that it is without prejudice to the right of these appellants or any of them to assert any rights which they may have by

reason of the matters alleged in said answer and cross-bill and in said intervening petition. It reads as follows:

> "It is further ordered, that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The next step these appellants attempted to take was an appeal to the Supreme Court. An appeal was allowed by the District Court but afterwards rescinded. Thereupon they applied to the Chief Justice of the Supreme Court of the United States for leave to appeal from said order of March 9, 1938, which struck out the cross-bill and denied leave to intervene. Though not shown of record on this appeal (but mentioned in the appendix to appellants' brief, p. 35), this petition was denied. The notation is found in 58 S. C. R. 1036, June 15, 1938. Upon this denial, petition for leave to appeal to this court, supported by the same documents, was presented and allowed in part by Judge Wilbur by order dated July 5, 1938 (R. 1271) as follows:

> "The petition of Charles E. Schmidt, et al., for leave to appeal from that portion of the order of March 9, 1938, denying leave to intervene, is granted; insofar as it requests leave to appeal from other portions of the order of March 9, 1938, and from other orders is denied; cost bond fixed at $500; no supersedeas allowed."

It thus appears that the only question now before this court is denial of petition for leave to intervene.

Motion to Dismiss.

Appellees, Northern Pacific Railway Company, Northern Pacific Railroad Company, Northwestern Improvement Company, Bankers Trust Company, and City Bank Farmers Trust Company, move the court to dismiss this appeal for the following reasons:

I.

This court has no jurisdiction of an appeal by Charles E. Schmidt et al. from the order of the District Court of March 9, 1938, denying leave to intervene herein because Section 7 of the Act of June 25, 1929 (46 Stat. 41) provides that this cause shall be expedited and the Act of May 22, 1936 (49 Stat. 1369) provides that an appeal may be taken direct to the Supreme Court from the order of October 3, 1935, and the order or decree entered upon a review of the report of the Master made pursuant to the order of April 21, 1936, within sixty days from the date of said last mentioned order.

II.

Appellants have not complied with Equity Rule No. 75. No praecipe indicating the portions of the record to be incorporated into the transcript on appeal was served upon these appellees or any of them or upon any solicitor of these appellees or any of them, and no such praecipe was filed with the Clerk of the United States District Court for the Eastern District of Washington, Northern Division, from which court this appeal is prosecuted.

III.

Appellants have not complied with Rules No. 14 and 16 of this Court. No transcript of the record in the court below containing the papers, documents and proceedings required by said Court Rule No. 14 has been made up by the Clerk of the United States District Court, and no transcript of the record as required by Rule No. 16 has been filed in this court.

The Clerk of said United States District Court has not made a certificate to the effect that he was returning a true copy of all the papers, documents and proceedings prescribed by Rule No. 14 of this court for the transcript of the record.

IV.

Appellants have not complied with Paragraph (b) of Equity Rule No. 75 and Rule No. 14 of this court in that no condensed or narrative statement of the evidence taken in the court below and necessary for consideration in this Court of the matters included in the assignment of errors has been settled or filed with the Clerk of the Court below, or included in the papers filed in this Court as a pretended record.

Argument on Motion to Dismiss.

1. It has been shown in the statement that this cause was brought under the Act of June 25, 1929, having for its object the adjustment of the land grants to Northern Pacific Railroad Company and determination of the compensation to which the Railway Company is entitled by reason of the withdrawal of indemnity lands and expropriation thereof by the United States. Section 7 provides that the case "shall be expedited in every way, and be assigned for hearing at

the earliest practicable day in any court in which it may be pending." The expediting provision is followed out in the Act of May 22, 1936 (49 Stat. 1369) by giving an appeal direct to the Supreme Court from the order of court confirming the Master's first report, and as well, from the decree (when it shall have been entered) on the Master's second report. As stated, the order or decree to be entered on the Master's second report has not yet been entered and the cause is still pending in the District Court for that purpose. Appellees submit that the only appeal which may be taken in this cause is an appeal direct to the Supreme Court from the said two orders and decrees of the District Court. To hold otherwise will be to defeat the provision for expediting this cause, contained in the Act of 1929, and the provision for direct appeal to the Supreme Court.

United States v. California Canneries, 279 U. S. 553, was a writ of certiorari to review an order of the Court of Appeals of the District of Columbia permitting intervention in a suit under the anti-trust act. The case is a sequel to *Swift & Co. v. United States*, 276 U. S. 311, a suit under the anti-trust act, in which consent decree was entered. Five years later defendants moved to vacate the decree. That proceeding came to the Supreme Court and the petition to vacate was denied. Thereafter the Canneries moved to suspend operation of the consent decree and to be allowed to intervene on the ground that the consent decree interfered with the performance by Armour & Co., one of the defendants, of a contract by which Armour & Co. agreed to buy large quantities of canned fruit. The Supreme Court of the District denied leave to intervene and the Court of Appeals reversed. The Supreme Court, on certiorari, held that Con-

gress by the expediting act sought to insure speedy disposition of suits in equity by the United States under the anti-trust act. The decision refers to opportunities for delay under the statutes of appeal and the purpose of Congress to avoid this delay and expedite the decision. The court said:

> "The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene. * * * Even under the Act of 1891, c. 517, in cases where the appeal was taken direct to this Court from the final decree in the trial court, every appeal thereafter taken in the cause was necessarily also to this Court. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 140-142; *St. Louis, Iron Mountain & Southern Ry. Co. v. Hasty*, 255 U. S. 252, 254. Compare *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368." (p. 559).

The expediting provision of the anti-trust act is quoted in the margin of 279 U. S. at p. 557. That act provides that the appeal "will lie only to the Supreme Court." The special appeal act of May 22, 1936, provides that a direct review by the Supreme Court "may be had." This difference in words is without legal significance. In the first place, the word "may" must be taken to mean "shall". But were it otherwise, it is plain that the right to appeal is given to both plaintiff and defendants. When the final decree is entered on the Master's second report, either party has the right to appeal to the Supreme Court within sixty days. It is plain, of course, that plaintiff could not appeal to the Supreme Court and defendants appeal to the Court of Appeals, although both have an equal right of appeal. The only appeal contemplated is

a direct appeal to the Supereme Court. Certainly this court would have no jurisdiction of an appeal by plaintiff or defendants from said orders. No court would have jurisdiction of such an appeal as both of said orders are interlocutory, except for the Act of May 22, 1936. Therefore, no appeal will lie except the appeal given by that act and that appeal must be direct to the Supreme Court. The Supreme Court thus having jurisdiction, it follows that all appealable orders entered in this cause are appealable only to the Supreme Court.

In the *Arkadelphia Case,* cited in the *Canneries Case*, it appears that the Supreme Court had held that a certain reduced rate order was valid. Upon going down of the mandate the shippers who paid the higher rate intervened in the case, claiming damages on the railroad company's supersedeas bond. The District Court allowed the claims of some and disallowed the claims of others. The parties aggrieved desired to appeal, and, being in doubt whether the appeal lay to the Supreme Court or to the Court of Appeals, prayed for and were allowed an appeal to both courts. It is held that as the main action is appealable directly to the Supreme Court, so also were any subsequent decrees made in a subordinate action or one ancillary to the main cause. The court said:

> "The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of

citizenship and the decree therein is for this reason made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation also are final. *Rouse v. Letcher,* 156 U. S. 47; *Gregory v. Van Ee,* 160 U. S. 643; *Rouse v. Hornsby,* 161 U. S. 588; *Oppe v. Louisville, &c. Ry. Co.,* 173 U. S. 573, 577.

"The proceeding out of which the decree now in question arose was not merely ancillary but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court reversing the final decrees in the main causes and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of the United States and as being made in a case in which a state law was claimed to be in contravention of the Federal Constitution, within the meaning of § 238, Judicial Code." (p. 142)

We think this case decisive of the proposition that where the Supreme Court has jurisdiction by direct appeal, jurisdiction of every other court is excluded. It will be noted that the special act refers only to the two orders in question. The final decree in the case, fixing the amount of compensation is yet to be entered. The *Arkadelphia Case* seems clearly to point out the court in which the appeal from that decree, if any be taken, must go. We say this, not because it is now important but in case it should be argued that the special appeal statute contemplates a direct appeal from these two orders only. It is held in the *Cannerics Case* that the rule applies to an appeal from an order granting or refusing leave to intervene.

The appellants, evidently recognizing the jurisdiction of the Supreme Court to allow an appeal, applied to that court and their application was denied. The matters presented to this court were the same as those presented to that court. The denial of the appeal should be taken as conclusive that the Supreme Court believed that the District Court correctly disposed of appellants' efforts to appeal from the order of the District Court refusing leave to intervene. Certainly the Supreme Court under the canon of the *Arkadelphia Case* had jurisdiction to allow the appeal if the application were otherwise meritorious.

Appellants insist that they have a legal right to intervene by virtue of the provisions of Section 5 of Act of 1929, *supra*. Passing the point that if they did have such a right, they have long since waived it by not making timely appearance, the legal effect of the foreclosure to be considered and determined is limited to its bearing on the adjustment of the grant, the only issue with which the United States is concerned. The Act requires the court to make findings and determine.

> "to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, etc."

Obviously this relates only to the legal effect of the foreclosure on the disposition by the Railway Company of the grant-

ed lands and its performance of the terms of the grant. The specific point to which this language must have been directed relates to the so-called $2.50 proviso of the Joint Resolution, reading as follows:

> "*Provided,* That all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

This issue was disposed of by the Master by paragraph XVIII of his first report (R. 628), and confirmed by the order of October 3, 1935.

The underscored language near the end of Section 5 of the Act of June 25, 1929, quoted *supra*, providing that the United States and the two railroad companies "or any other proper person" shall be entitled to have heard and determined by the court all questions of law and fact and all claims and matters which may be germane to a complete adjudication of the respective rights of the United States and said companies under said Act of July 2, 1864, and said Joint Resolution of May 31, 1870, obviously means only

questions which are germane to an adjustment of the grant. The questions to be adjudicated must be those which are germane to an adjudication of the rights of the United States and said companies arising out of and under said Act of July 2, 1864, and said Joint Resolution of May 31, 1870. As has been shown, this issue has been fully determined by the Master's first report and the law fully complied with.

The Master took the same view of the scope of the Act of June 25, 1929, in his first report. He concludes his discussion of the act (R. 453) as follows:

> "It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organization of the company to the date of the Act that had been, or that now might be raised, should be presented to the Court and finally determined; and that upon such determination should be based an adjustment of the grant."

The claims of these appellants as stockholders of the old Railroad Company to the railroad and land grant and all other assets, does not arise out of the Act of July 2, 1864, or the Joint Resolution of 1870. They arise out of their claimed status as stockholders. But as often said, if it were otherwise, they should have come in at the proper time, and not when the case has been disposed of, and to have it reopened and delayed would be in defeat of the expediting requirements of the Act of 1929.

Not only are these appellants' claims not included in the Act of 1929, but they are contrary to the express provisions of Section 4. Note that Section 4 provides that the Act shall not affect the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, etc., to the right of way of said road or lands

actually used in good faith by the Northern Pacific Railway Company in the operation of said road. Thus the Act recognizes the title of the Railway Company to the railroad, station grounds and appurtenances. Yet appellants contend that they are authorized by that same act to litigate in this case claims of the Railroad Company or its stockholders, or an insignificant fraction of the stockholders, to the railroad and right of way, title to which is expressly excluded from the scope of the suit required to be brought by the Act. In other words, only an adjustment of the rights of the respective parties in and to the land grant is involved in this case, to the complete exclusion of any inquiry concerning the right of any one in and to the railroad and right of way, station grounds, etc. Of course, if appellants' view of this statute is correct, there is no conceivable claim held by anyone against the railroad or Railway Company which could not be presented in this case.

2. Equity Rule 75 begins:

"In case of appeal:

"(*a*) It shall be the duty of the appellant or his solicitor to file with the clerk of the court from which the appeal is prosecuted, together with proof or acknowledgment of service of a copy on the appellee or his solicitor, a *praecipe* which shall indicate the portions of the record to be incorporated into the transcript on such appeal. Should the appellee or his solicitor desire additional portions of the record incorporated into the transcript, he shall file with the clerk of the court his *praecipe* also within ten days thereafter, unless the time shall be enlarged by the court or a judge thereof, indicating such additional portions of the record desired by him."

Appellants made no attempt to serve upon appellees or any of them a praecipe and to file a praecipe with the Clerk. Instead of observing the rule appellants obtained from the Clerk a number of certified copies and his certificate to the correctness of the copies and that he had been paid required fees. Parties taking an appeal cannot make up a record to suit themselves without regard to rules and practice of the court. The Supreme Court so held long ago. *Railroad Company v. Schutte,* 100 U. S., at page 647.

There were more urgent reasons than ordinarily in case of appeal why here Equity Rule 75 should be observed as to the praecipe and as to a simple condensed statement of the evidence necessary for consideration of the errors urged. The petition to intervene was filed January 31, 1938, more than seven years after this suit was commenced, July 31, 1930. Before the stockholders took any steps to intervene the Special Master had filed two lengthy reports, each of them preceded by the taking of voluminous evidence. The District Court, in sustaining and adopting the first report of the Master, ruled upon a large number of exceptions. The second report of the Master passed upon every issue remaining in the case except the value of land for which any party might be entitled to compensation. So obviously a transcript of the record made up under the applicable rules and practice of the Court was a necessity for a hearing in this Court.

In discussion of the praecipe, in Cyclopedia of Federal Procedure, Vol. 6, Sec. 2836, the writer says:

> "Since the statement of evidence when approved is to be filed and then constitutes a part of the record, the praecipe should designate it as a part to be included. It thus appears that there are two kinds of differences to be settled under the direction of the judge, i. e., differ-

ences as to the 'general contents of the record' and differences as to the evidence to be stated or the form of it. Both of these are to be settled in the same general way by the judge's directions. It will be seen also that the praecipe practice resembles that prescribed for determining what shall be embodied in the printed record above, which requirement of praecipes was added to the Supreme Court rules in 1911, applying to both law and equity records on appeal, but with the addition of power to the trial judge in equity to settle disputes and give directions. All these praecipes are the means of selecting and carrying into the appellate record the necessary and essential proceedings. The rules are not designed to exclude any of them, but to exclude what is unnecessary, and they plainly indicate that intention when read together."

The Equity Rules have the force of a statute. Their provisions cannot be disregarded.

Roosevelt v. Missouri Life Ins. Co., (8 C. C. A.) 70 Fed. (2d) 945.

Humphrey v. Helgerson, 78 Fed. (2d) 485.

Buessel v. United States (2 C. C. A.), 258 Fed. 824.

3. No transcript of the record has been filed that conforms to Rules 14 and 16 of this Court. Rule 14, paragraph 1, is:

"1. The clerk of the court from which an appeal has been taken shall make a return of the same by transmitting a true copy of the record, opinion or opinions of the court, bill of exceptions, or statement of evidence and assignment of errors, and all proceedings in the case, under his hand and the seal of the court."

In paragraph 3 of Rule 14 it is provided that no case will be heard until a complete record containing all papers, ex-

hibits, depositions and other proceedings necessary to hearing in this court shall be filed.

Rule 16, paragraph 1, in part reads:

> "1. It shall be the duty of the appellant to file the record thereof and docket the case with the clerk of this court at San Francisco, Calif., before the return day in vacation or in term time. But for good cause shown the trial judge, or, in the event of his absence or disability, any other judge of the trial court, or any judge of this court may enlarge the time before its expiration, the order of enlargement to be filed with the clerk of this court."

There is no certificate of the clerk that he has made a return as required by Rule 14. The pretended transcript of copies filed by appellants in this Court does not conform to the requirements of Rules 14 and 16. In the absence of a praecipe and with no kind of statement of the evidence the clerk of the District Court was helpless in making up a transcript of the record. The printed so-called record contains 3 certificates of the clerk affirming the correctness of certain annexed copies. Those certificates manifestly are insufficient and of no force on this point.

In Simkins Federal Practice, (Schweppe Edition, 1934), Section 996, the writer says that if the appellee thinks the transcript is defective, he should resort to certiorari to bring up a complete record. This statement apparently has application if there is a transcript, prima facie lawful, in the appellate court.

In *Meyer v. Implement Co.* (5th C. C. A.), 85 Fed. 874, an equity case, the appeal was dismissed on motion urging that no properly authenticated transcript had been filed. The Clerk's certificate merely recited that "the foregoing

was a true copy of the following, namely:" On pages 875-6 the court says:

> "This court, in order to maintain an appeal upon its docket, must have at least prima facie proof that it has a lawful transcript before it. The prima facie showing results from an unqualified certificate of the clerk, from a stipulation of the parties, or from a direction by the appellant's counsel. It will be presumed, in the case of stipulations, that the parties have been careful to bring up all the papers necessary from the standpoint of either side of the controversy; and the clerk and the appellant's counsel, being officers of the court, are presumed to see that a lawful transcript is lodged in this court. Where a transcript prima facie lawful is before the court,—as in the case above cited of Nashua & L. R. Corp. v. Boston & L. R. Corp., a motion to dismiss the appeal will not be entertained, and the dissatisfied party must resort to the writ of certiorari. But when, as in the case before us, not even a prima facie transcript has been filed in this court, the proper action is to dismiss the appeal. Where the clerk certified to a full transcript, and it was urged that the transcript was incomplete, the supreme court held that the transcript was prima facie lawful, and that the deficiencies, if any, might be supplied by certiorari. The Rio Grande, 19 Wall. 188."

In Simkins Federal Practice, Sec. 995, page 902, the writer says:

> "An authenticated transcript of the record, assignment of errors, and all proceedings in the case, under the hand of the clerk and seal of the court, should be transmitted to the appellate court by the clerk.
>
> "The clerk's certificate must show that the transcript is complete, and not simply that the matters contained in the transcript are correct copies, or it must show that the record as sent up was designated by the stipula-

tions of counsel, or that the clerk was guided by equity rule 75 in preparing the transcript and selecting the papers necessary to a hearing."

In *Dixon v. Brown,* (5 C. C. A.) 9 Fed. (2d) 63, the appellant did not file with the Clerk of the Appellate Court a transcript of the record of the lower court, certified by the Clerk of that court, as required by 36 Stat. 901, Sec. 865, Title 28 U. S. C. A. The appellant delayed until after argument of the case was entered upon before taking action to compel the Clerk of the lower court to certify a printed transcript of the record. The court says that what was printed and filed was not a true copy of the transcript of the record in the cause because it was disclosed that entire orders of the lower court and other documents referred to in those orders were omitted; that in the absence of authenticated evidence of the record made by the lower court the appellate court could not properly undertake to review that record. The appeal was dismissed.

It is submitted that the motion to dismiss should be granted.

Argument on the Merits.

1. The intervention was properly denied for the reason that appellants sought to impeach proceedings had in the cause long prior to the attempt to intervene. It is shown in the opening statement that these parties made no effort to appear in this cause until after the Master had filed his second report on July 26, 1937. Then they sought to come in without motion or leave, by so-called answer and cross-bill. This document was stricken by the order of March 9, 1938. This court did not allow an appeal from that portion of the order. The petition for leave to intervene was not

filed until January 31, 1938. The intervention seeks to attack proceedings had in the cause long prior to the date it was filed. By the order of court confirming the Master's first report, the successorship of the Railway Company and its ownership of the railroad, and of the land grant and of all the property of the Railroad Company was adjudicated between the United States and defendants. See Master's first report, R. 646-648. If these parties ever had a right to assert in this proceeding their alleged rights as stockholders of the old Railroad Company on the ground that the mortgages given by that company and the foreclosure thereof and the deeds of conveyance from the trustees, the Master, and the Railroad Company to the Railway Company pursuant to said foreclosure decrees were invalid, they should have presented their contentions in due time after this suit was commenced by the United States. Now, after years of delay and after, at great pains and expense, the issue in which these appellants now assert a right to be heard, has been determined, they seek to attack that determination and retry this cause from its very beginning. If these parties are now allowed to intervene and assert the cause of action described in the intervention, much of the proceedings leading up to the Master's first report was waste motion. It is well settled, as of course it must be, that an intervention coming at this stage of the case is too late. In the *Canneries Case* the court, referring to the decision of the Court of Appeals allowing intervention, said:

> "Nor did it refer to the settled rule of practice that intervention will not be allowed for the purpose of impeaching a decree already made." (Citing many cases) (p. 556)

These appellants were not parties to the proceedings leading up to the Master's first report and have taken no exceptions to that report. It is well settled that the court's order confirming this report has become the law of this case and no party can now question it. If the parties to the cause cannot question it, certainly those who are not cannot now come in and question it. Nothing now remains to be done with respect to the Master's first report except to make the formal findings and conclusions and decree as required by Section 5 of the Act of June 25, 1929. As heretofore noted, those findings would have been made at the time the exceptions were passed upon but for the fact that at that time the order was merely interlocutory and did not become appealable or need to be supported by such findings until the Act of May 22, 1936, was passed. By virtue of that Act this order became appealable and it will be appropriate now to make findings required by the Act of 1929 as well as by the Equity Rules. On these findings and conclusions the court will enter a final decree from which an appeal can be taken direct to the Supreme Court. Certainly there is no hardship worked upon appellants because the court was careful to provide in the two orders above referred to that denial of the intervention at this time should in no way prejudice the right of these appellants to assert in any other proceeding, even in this proceeding hereafter, any rights that they may have by reason of the matters alleged in the so-called cross-bill as well as in their proposed intervention.

2. The intervention was properly denied for the reason that the asserted rights of appellants as stockholders of the Railroad Company in and to the property now owned and operated by the Railway Company and the alternative relief by way of judgment for the value of their stock, are not ger-

mane to the causes of action asserted in the bill of complaint. It is well settled, of course, that one cannot come into a case between others and assert rights foreign to the cause of action pending between plaintiff and defendants.

In *Chandler & Price Co. v. Brandtjen & Kluge, Inc., et al.*, 296 U. S. 53, Brandtjen & Kluge brought the suit against one Freeman, alleging that plaintiff was the owner of a certain patent for an improvement on a printing press and that defendant was using an infringing press. Injunction and accounting were prayed for. Before answer, Chandler and Price Co. applied for leave to intervene, showing to the Court that it was the manufacturer of and sold the printing press to the defendant and other facts. Intervention was allowed and the defendant and intervener filed a joint answer. The intervener set up a counterclaim against plaintiff, alleging that plaintiff was infringing a patent owned by the intervener and injunction and accounting were prayed. The original defendant had no interest in the patent owned by the intervener and the original bill did not allege any cause of action nor pray judgment against the intervener. On motion the counterclaim was dismissed. The ruling was sustained by the Circuit Court of Appeals. The Court, in its opinion, says:

> "There is no suggestion that defendant has any interest in the counterclaim or that the issues between intervener and plaintiff that are tendered by, or that might possibly arise out of, the counterclaim may not be adjudged in a separate suit. The intervenor was not entitled to come into the suit for the purpose of having adjudicated a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited

to the field of litigation open to the original parties" (pp. 57-58).

"It is essential that the applicant shall claim an interest in the matters there in controversy between the plaintiff and original defendant. The purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something there in dispute between the original parties. Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.

"Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill." (p. 59).

In *King v. Barr*, 262 Fed. 56 (9th C. C. A.) the third paragraph of the syllabus reads as follows:

"Where the final decree in a suit involving the receivership of a corporation to satisfy mortgage demands had been entered some six months before a bondholder filed an application to intervene which challenged the validity of the entire proceeding, *held*, that trial court did not abuse its discretion in denying such petition, with leave to contest the disposal of funds remaining in the receiver's hands, in view of the fact that the petitioner had known of the pending proceeding long before entry of the final decree."

In *Whittaker v. Brictson Mfg. Co.*, (8th C. C. A.) 43 Fed. (2d) 485, the court says:

(p. 489) "While intervention under some circumstances may be a matter of right, if properly presented to the court, it is generally a matter of sound legal dis-

cretion exercised in line with recognized judicial standards in the interest of justice.

(p. 490) "We quote from 11 Encyclopedia of Pleading and Practice, pp. 509, 510: 'An intervener in a suit between other parties must accept such suit as he finds it, and is bound by the record of the case at the time of his intervention. He cannot raise an issue as to whether the proceedings are regular, nor can he plead exceptions having for their object the dismissal of the action. He cannot raise new issues in the suit, nor insist upon a change in the form of the proceeding.'

(p. 491) "To seek to set aside the entire proceedings in a case and to have the same held for naught on the ground that they were absolutely void cannot be in recognition of the propriety of the main suit."

In *Board of Drainage Commissioners v. Lafayette Bank*, (4 C. C. A.) 27 Fed. (2d) 286, on page 296, the court says:

"This rule (Equity Rule 37), in plain terms, permits intervention in subordination to, and in recognition of, the propriety of the main proceedings, hence to seek to intervene with the view of challenging the jurisdiction of the court, or otherwise inaugurating litigation not within the scope and purview of the original suit, is not permissible, and should be denied." (p. 296)

"The effort to intervene was in no sense one in recognition of the propriety of the main proceedings, or intended to be subordinate thereto, but, on the contrary, was directly antagonistic to everything that was sought to be done in the main suit, and intended to contravene the same, and was filed therein after that suit had been pending more than two years." (p. 296)

3. The general rule is that a petition to intervene is addressed to the sound discretion of the court, and that an order denying intervention is not an appealable order. It is only in exceptional cases that such an order is appeal-

able. In *United States v. California Canneries*, 279 U. S. 553, on page 556, the court says that an order denying intervention is appealable only when one seeking to intervene has a direct and immediate interest in the *res* that is the subject of the suit. No argument is needed to show that these stockholders have no such an interest in the subject matter of this suit. All the relief they ever could get could have been obtained in the stockholder Hoover suit commenced in 1900 and now pending. The Hoover suit, and the activity of these stockholders in connection with it, are recited at length in the petition to intervene. (Par. 5th, R. 1044-1057). The order appealed from has not any characteristic of a final order concluding the stockholders from enforcing their alleged rights.

In *Credits Commutation Co. v. United States*, 177 U. S. 311, on pages 315-316, the court says:

> "The question was well considered by the Circuit Court of Appeals, and we quote and adopt its statement, as follows:
>
> " 'When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court * * *. It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is

fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated.' "

Their rights are expressly saved by the order denying leave to intervene as above shown.

The above decision was followed by this court in *Rodman v. Richfield Oil Co.,* 66 Fed. (2d) 244.

In *Palmer v. Bankers' Trust Co.* (C. C. A. 8th), 12 Fed. (2d) 747, on page 752, the court says:

"In each case the court is called upon to exercise its sound legal judgment. In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute. (Citing cases.) In other cases, the facts and circumstances may be such that the court is clearly justified in denying intervention. The mere matter of delay alone is often a decisive factor with the court. *First Nat. Bank v. Shedd,* 121 U. S. 74, 86, 7 S. Ct. 807, 30 L. Ed. 877."

In *Lewis v. Baltimore & L. R. Co.* (C. C. A. 4th), 62 Fed. 218, on pages 221, 222, the court says:

"No right of the petitioner has been finally adjudicated by any of the orders of the court. Besides, this refusal of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right. In the language of

> Waite, C. J., in Ex Parte Cutting, 94 U. S. 22: 'No appeal lies from the order refusing them leave to intervene to become parties. That was a motion in the cause, and not an independent suit in equity, appealable here.' Were the courts of last resort to entertain appeals to make a person a party, causes would be constantly going up piecemeal, great confusion would be created, and insufferable delays caused."

4. The petitioners were guilty of inexcusable laches. The first attempt to come into the suit was by filing on September 3, 1937, the pretended answer and cross-bill without asking leave of the court. The suit was commenced July 31, 1930. The Special Master was appointed February 25, 1932, and defenses on points of law and motions in the nature of demurrers were referred to him in the order of reference. The Master filed his first report May 31, 1933, in which he ruled upon the 1875 reorganization and the 1896 foreclosure proceedings. Said report, as already stated, was adopted by the Court and all exceptions thereto overruled by order of October 3, 1935. Lengthy hearings for taking of evidence were held, beginning in April, 1936, and the Master's second report was filed July 26, 1937. These stockholders delayed more than seven years after the commencement of the suit and more than four years after the filing of the Master's first report before they filed the alleged answer and cross-bill. The petition for leave to intervene was not filed until January 31, 1938. This unexplained delay amounts to such laches as justified the District Court in denying leave to intervene.

In *Levy v. Equitable Trust Co.* (C. C. A. 8th) 271 Fed. 49, some individual stockholders of the Denver & Rio Grande R. R. Co. unsuccessfully sought to intervene in the

suit pending in the trial court, in which a decree had been entered for the sale of the equity of the Denver Company in its railroad properties. The court says, on page 55:

"After all the above had occurred with such publicity as usually attends important matters of that kind, the petitioning stockholders asked the court below to stay further proceedings to enable them to investigate and assert a defense of fraud to the New York judgment not made by their corporation; and the essential elements of the fraud they assert consist of matters of long standing, not secret or concealed at the time, but of public notoriety or report, part in recitals in the records of their railroad company kept as required by law, of which they were bound to take notice, and part of known corporate history shown in financial and statistical publications in current and common use. The very corporate structure of the consolidated Denver, in which the petitioners hold their stock, discloses (1908) an express assumption of the obligations of contract B which they now assail. They knew or should have known that the litigation in California and New York against the Western Pacific (1915-1916) might affect seriously their interests in the Denver. But, whether so or not, the suit of the Trust Company against the Denver in the Southern district of New York (1915-1917) was at once a warning of what might follow. The Trust Company sought in that suit the subjection of the property of the Denver to its liability under contract B and so stated in its initial pleading. *The case was pending in that court for two years before final judgment was rendered, and the Denver corporation was allowed to defend it without action or participation upon the record by the stockholders.*

"These and many other proceedings and transactions within the five years prior to their petition to intervene, of which they knew or could have known, and therefore must in law have known, constitute an obstacle to the

relief now sought which the court below had no power to remove. Leavenworth Commissioners v. Railway, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; Foster v. Railroad, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899." (Italics supplied).

In *Young v. Southern Pacific Co.* (C. C. A. 2nd), 34 Fed. (2d) 135, the court below dismissed the complaint because of inexcusable laches appearing on the face of the complaint. On page 137 the court says:

"By an amendment to the bill, it is alleged that others were allowed to intervene in the Bogert Case. This is no excuse for the long delay and appellants' inactivity. In the Bogert Case, the bill alleged sufficient details of the activity of the plaintiffs there to excuse the long delay. Nothing in this bill suggests appellants' connection with the Bogert Case, except the unsuccessful attempt to intervene. This prior litigation does not excuse the delay of the appellants, for they were not parties. Cressey v. Meyer, 138 U. S. 525, 11 S. Ct. 387, 34 L. Ed. 1018. During this long period, the bill alleges, the stock increased to great value. The reorganization agreement, attacked by the bill of complaint, shows that unsecured debt creditors were offered stock in the new company for their indebtedness, if they paid the expenses of the reorganization. None accepted this offer. The reorganization expenses amounted to $26 per share. In the Bogert Case the final decree, made pursuant to the Supreme Court's mandate, required $60 per share in order to acquire the new stock. Creditors to whom this offer was made apparently regarded the stock then as of little value.

"The change in the value of the stock, under the circumstances here disclosed, no longer entitles the appellants to the aid of a court of equity. Wetzel v. Minnesota Ry. Transp. Co., 169 U. S. 237, 18 S. Ct. 307, 42 L. Ed. 730; Abraham v. Ordway, 158 U. S. 416, 420, 15

S. Ct. 894, 39 L. Ed. 1036. If the interveners, who were denied intervention in the Bogert Case, were guilty of laches, there is more reason to successfully charge laches against the present appellants. It was more than 2½ years later that the appellants began this suit. They might have had the relief given to the Bogert stockholders, if they had been active. The appellee purchased all the new stock under the reorganization agreement, including that owned by the Bogert plaintiffs. It was after that purchase that the present appellants commenced this suit."

These appellees respectfully submit that if the motion to dismiss is denied, the order of the District Court should be affirmed.

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